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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1091 [redacted]

VIRGIL OGLETREE, *et al.*,
Petitioners,

vs.

THE STATE OF OHIO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

JOHN T. CORRIGAN,
Prosecuting Attorney of Cuyahoga County, Ohio,

LLOYD O. BROWN,
Assistant Prosecuting Attorney,
Criminal Courts Building,
Cleveland, Ohio 44114,
Attorneys for Respondent.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION.

There is no substantial federal question involved which would require this Court to review this case.

The questions herein presented were raised both in the Court of Appeals of Cuyahoga County, Ohio, and the Supreme Court of Ohio. The Court of Appeals affirmed without writing an opinion, and the Ohio Supreme Court refused leave to appeal.

The Ohio courts decided this case in accordance with the statutes of the State of Ohio and in accordance with the Constitution of the United States and the applicable decisions of this Court. There is therefore no substantial federal question involved.

QUESTIONS PRESENTED.

Petitioners claim they were denied due process of law in violation of the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States in that (1) they were convicted under a statute that is vague and ambiguous and therefore unconstitutional; (2) they were convicted upon evidence obtained by an illegal search and seizure; (3) they were prejudiced by the prosecutor's comments on the failure of their codefendants to testify; (4) the trial court's instruction inadequately defined the offense.

STATEMENT OF THE CASE.

On March 26, 1964, at about 3:00 p.m., Patrolmen McCool and Wandra of the Cleveland Police Department were observing the property at 722 Thornhill Drive, in Cleveland. They saw the defendants Virgil Ogletree and Henry Harris arrive and enter the house by the side door at about 3:15 p.m. (R. 84). At about 3:20 p.m. a woman, later learned to be Janice Franklin, arrived carrying a brown paper bag and went in the side door (R. 85). At about 3:50 p.m. four other women—Marie Bishop, Juanita Umphryes, Kathryn Bishop and Nannie Teague—arrived and they also went in the house (R. 84). At about 4:00 p.m. a man later learned to be Jesse Haskins arrived and entered the house (R. 87).

At this point the officers went to a parking lot at St. Clair and Eddy Road where they picked up Sgt. Dever and other officers. Armed with a search warrant they returned to 722 Thornhill Drive and went to the side door of the house. Sgt. Dever knocked and announced, "This is the police. I have a search warrant." (R. 89.)

Someone inside the house yelled and the officers heard

the footsteps of persons running (R. 90). The officers then pushed in the door and gained entrance. The officers attempted to gain entrance to the attic through a second floor door by means of a hatchet. This was not successful because a plywood trapdoor was in the way. The Fire Department was then called (R. 95). Smoke was then coming from the third-floor windows of the house (R. 96). Entrance into the attic was made through the third-floor windows. When the officers entered the attic, all of the defendants were standing or sitting around two large tables. Fires were burning in an incinerator and in a wash bucket. The occupants of the room were all arrested. The officers photographed burned adding machine tapes along with four adding machines and other paraphernalia. These items were then removed and tagged and admitted as evidence at the trial.

The search warrant in this case was predicated on information from a reliable informer plus the personal observations of Patrolman McCool of the Bureau of Special Services at 722 Thornhill Drive. The officer had seen Ogletree, who was a known clearinghouse operator, go into the house with an unidentified female on March 25th, and with this information and the information from the informer the officer presented to Judge James Cassidy an affidavit (St. Ex. 1) and obtained the warrant (St. Ex. 2). Armed with this warrant and after further surveillance the officers entered the house as related above. As a result the eight defendants were arrested and charged with promoting a scheme of chance and later indicted for promoting a scheme of chance (R. C. 2915.13).

All of the defendants pleaded not guilty. Several motions were filed and argued to the court, to-wit, motion to quash, motion for a bill of particulars, motion for a supplemental bill of particulars, motion to suppress evidence.

All of these motions were overruled except the motion for a bill of particulars. A bill of particulars was filed.

Upon trial to a jury, all of the defendants were found guilty as charged. The Court of Appeals, Eighth Appellate District of Ohio, found no error prejudicial to the appellants, Virgil Ogletree and Kathryn Bishop, and affirmed the judgment of the trial court. As to the other defendants, the judgment was reversed because of comment by the trial court and the prosecutor upon their failure to testify. The Supreme Court of Ohio refused to certify and review.

ARGUMENT.

A. The petitioner's argument that the statute under which they were indicted (Section 2915.13 of the Ohio Revised Code) is so vague and ambiguous as to be void and without legal effect involves the construction of a state penal statute, with which this Court is not ordinarily concerned.

Furthermore, the petitioners' objections are without merit. The pertinent part of Revised Code Section 2915.13, is as follows:

> "No person shall establish, open, set on foot, carry on, promote, make, draw, or act as 'backer' or 'vendor' for or on account of a scheme of chance known as 'policy,' 'numbers game,' 'clearing house,' or by words or terms of similar import, located in or to be drawn, paid, or carried on within or without this state, or by any of such means sell or expose for sale anything of value."

Particular complaint is made that the words "carry on" are not sufficiently descriptive of the court of conduct prohibited. As applied to gambling, this phrase is defined in 38 *Corpus Juris Secundum,* "Gaming," sec. 1, p. 54:

> "*Carry On.* As applied to gambling or a business of like character, the phrase means to continue to prosecute, to keep in progress, or to manage or to be engaged in." Citing *Thompson v. Ackerman*, 21 Ohio Cir. Ct. 740, 744, 12 Ohio Cir. Dec. 456.

In the cited case of *Thompson v. Ackerman* the court had under consideration the recovery of possession of leased premises used for gaming purposes. The Circuit Court said:

> " 'To conduct,' according to the Century Dictionary, means to direct the course of, to manage, to carry on, and by the same authority, to carry on means to manage or be engaged in, to continue, to prosecute, to keep in progress."

Also, an Ohio Court of Appeals in *State v. Gardner*, 75 Abs. 319, 137 N. E. 2d 44 (1954), did not have any difficulty whatever in determining the meaning of the phrase "carry on." The Court said in a per curiam opinion:

> "The police officer testified how the numbers game was operated, how the slips introduced into evidence were used in the game, and that the defendant 'carried on' a numbers game."

The petitioners, with the exception of Virgil Ogletree, claim they were not furnished with a bill of particulars. All their requests for a bill of particulars were duplicates of the request made by Ogletree and were filed by the same counsel, Mr. Willis. A bill of particulars was furnished to Mr. Willis for Ogletree, and in the circumstances this was sufficient.

As to the denial of an amended bill of particulars to Mr. Ogletree, the rule is stated in *State v. Petro*, 148 O. S. 473, that, "A prosecuting attorney is not required to disclose the state's evidence through a bill of particulars, but is required to state specifically the nature of the offense

charged, * * *." In the bill of particulars furnished to Ogletree the offense charged is stated specifically and that is all that was required. To have stated more would be giving to the defendant matters of evidence.

B, C, and D. Petitioners' questions of law three through eight deal with the claim that there was introduced into evidence over the objection of the defense items obtained by an illegal search warrant.

Section 2933.23 of the Ohio Revised Code sets forth the essential factors to be included in the affidavit for a search warrant. The affidavit must state:

1. The place to be searched.
2. The person to be seized.
3. The thing to be searched for.
4. That the complainant believes or has good cause to believe that the things are there concealed.
5. The facts upon which such belief is based.

In addition, the judge or magistrate may demand other and further evidence before issuing the warrant.

In the present case, on March 25, 1964, the personal observation was made by Officer McCool of the Bureau of Special Investigation of the Cleveland Police Department, assigned to investigate rackets and gambling operations. Officer McCool had had years of experience in investigating clearinghouse activities and was very familiar with its method, paraphernalia and manner of operation. On March 25, Officer McCool saw Virgil Ogletree, a known clearinghouse operator, and others going into the house at 722 Thornhill Drive. Armed with this information and with the information given him by a reliable informer, the officer went to the Cleveland Municipal Court and

consulted with Judge Cassidy. The affidavit was then filed and the search warrant issued by the judge.

Whether the affidavit alleged sufficient facts upon which to base probable cause was in the first instance for the trial court to determine. By overruling the motion to suppress the trial court in effect found from examination of the affidavit, and the search warrant itself disclosed, that the affidavit was prepared and the search warrant issued, first, upon observations of a member of the Cleveland Police Department and, second, from information from a confidential source.

The officer did not rely solely upon the information he had received from the informer concerning the clearinghouse activity at this address. He went further and actually made positive observation at the precise point where the information concerning clearinghouse activity had indicated. Here we have credible confidential information from a reliable informant plus actual observation by police officers. These facts formed the foundation for the officer's having good cause to believe that clearinghouse activity with its incident equipment and paraphernalia existed in the house at 722 Thornhill Drive.

No decision by this Court has ever struck down a search warrant on the ground of lack of probable cause in a situation where there was actual observation by government officers.

Probably the leading case on the issuance of a search warrant is *Aguilar v. Texas,* 378 U. S. 108, 12 L. ed. 2d 723. There the Court reversed because the affidavit did not contain any information other than that "Affiants have received reliable information from a credible person and do believe * * *." No other information was brought to the attention of the magistrate. In the present case the affidavit recites that the officer made personal observation

in addition to having the information from a reliable informer.

The decision in *McDonald v. United States,* 335 U. S. 451, does not support the petitioner's position. In *McDonald* the officers did not obtain a search warrant, but after hearing an adding machine "one of them opened a window leading to the landlady's room and climbed through it." There was an actual breaking and entering without a warrant.

The decision in *Stanford v. Texas,* 379 U. S. 476, cited by petitioners, refers to search warrants that (a) are general in nature, and (b) fail to describe particularly the place to be searched and the person or property to be seized. In the present case the warrant specifically sets forth contraband to be seized at a specific address and describes the contraband as "clearing house slips, adding machines and other paraphernalia used in carrying on a clearinghouse operation numbers game."

Petitioners complain that the warrant was not executed in compliance with the statutes requiring notice of authority and purpose before forcing entry. There is no law prescribing a minimum time that officers must wait for a response after informing that they are police officers and have a search warrant. Section 2935.12 does not specify any length of time or require any words of refusal. In *Ker v. California,* 375 U. S. 23, Mr. Justice Clark points out that "suspects have no constitutional right to destroy or dispose of evidence." The *Ker* opinion goes so far as to state that the officers would not have been required to demand entrance and state their purpose "if the officers' peril would have been increased or the arrest frustrated had he demanded entrance and stated his purpose. The California statute under consideration in *Ker* is similar to Section 2935.12 of the Ohio Revised Code.

In the present case the officers did state their purpose and authority. Surely, in the circumstances of this case the officers acted properly, and even so the very evidence they were seeking was in process of being burned while they were effecting entrance. The officers testified, on both direct and cross-examination, that they knocked on the door and in clear, audible voices announced that they were the police and had a search warrant. They heard footsteps and voices inside saying, "It is the police." Only after being refused admittance did they break down the outer and inner doors.

Miller v. United States, 357 U. S. 301, cited by petitioners, can be distinguished even on the facts set forth in defendant's brief. In the *Miller* case the officers broke the door without a warrant and without announcing themselves. There was no notice of authority.

E. Whether these petitioners were actually carrying on a scheme of chance is an issue of fact which has been determined in the Ohio courts and is not open to reconsideration by this Court. No denial of constitutional rights is involved in this issue.

F. Petitioners claim that because the convictions of their codefendants who did not testify were reversed and remanded for violation of the Griffin rule, the "interest of justice" requires that their convictions likewise be reversed. Petitioners' theory apparently is that the prejudicial effect of comment on the failure of the codefendants to testify contributed to the conviction of the defendants who did testify on their own behalf. Such contention is obviously without merit. If anything, the impact would have been favorable to petitioners for having taken the witness stand while their codefendants remained silent.

Similar claims were presented to the Ohio Supreme Court in *State v. Lynn*, 5 Ohio St. 2d 106, where the error was rejected on procedural grounds, and in *State v. Scott*, where the motion for leave to appeal was overruled and appeal as of right dismissed. In this situation there is no constitutional error presented requiring review by this Court.

G. Petitioners contend that the trial court's instruction as to the meaning of the Ohio statute under which petitioners were charged amounts to a denial of due process. This, along with their other claims of error involving matters of evidence and statutory construction, furnish no ground for this Court's intervention, for under our federal regime, state courts, state agencies, and state legislatures are the final expositors of state law. *Brady v. Maryland*, 373 U. S. 83, 10 L. Ed. 2d 215.

CONCLUSION.

The officers did use a search warrant in this case. They obtained a warrant from a judicial officer "upon probable cause," including personal observation, supported by oath or affirmation and particularly describing the place to be searched and the things to be seized. In executing the warrant they complied with the statute requiring notice of authority and purpose before forcing entry.

The petitioners herein have not shown any deprivation of the constitutional protections against unnecessary invasions of privacy entitling them to review by this Court. The writ should therefore be denied.

Respectfully submitted,

JOHN T. CORRIGAN,
Prosecuting Attorney of Cuyahoga County,

LLOYD O. BROWN,
Assistant Prosecuting Attorney,
Attorneys for Respondent.